IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1747 OF 2005

M/s. Cymbionic Marketing
Pvt. Ltd. ...Petitioner

Vs.

State of Maharashtra ...Respondent

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Mr. A.M.Sarogi, Advocate, for Petitioner

Mr.Rajesh More, A.P.P. for Respondent-State

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATE OF RESERVING THE ORDER : 30.08.2005

DATE OF PRONOUNCING THE ORDER : 12.09.2005

P.C.

1. Heard the learned advocate for the petitioner and the learned A.P.P. for the State.

2. The petitioner has preferred this petition for quashing of Case No.1471/PW/2005 pending before the

learned Metropolitan Magistrate, 19th Court, Esplanade, Mumbai. The said case pertains to FIR No.77 of 2003. The said case is under Section 420, 406, r.w. 120-B of IPC read with Sections 3, 4 and 5 of The Prize Chits and Money Circulation Schemes (Banning) Act, 1978. (hereinafter referred to as 'Prize Chit Act']

3. It is the case of the complainant that the petitioner-company is a Multi Level Marketing Company. It is the case of the complainant that he was invited by his friend Mr.Sudam Sonawane to attend the presentation given by the Petitioner-company. As the said scheme seemed to be attractive, the complainant attended the presentation. He had to pay a sum of Rs.500/- as admission fee for the presentation. The presentation was held in a big hall. In the presentation, it was explained how to make money by inviting friends for presentation. If the invited friend becomes a member, the person who invites him, gets commission for each new member who has enrolled. As the number of new members invited by the initial member increases, the original member

would get larger commission. The said company simultaneously offered packages consisting of gold, jewellery, travel package and club membership. The price of the said package was approximately Rs.53,000/-. In his complaint it is further stated that the complainant was given voucher for Rs.20,000/- for the gold jewellery and for the rest of the amount, he was given travel vouchers, club membership for one year to club Aquaria and a customer club card. He received all the three packages relating to jewellery, holidays, club membership and Customer Club Card within a few days of becoming a member. The Customer Club Card entitled the member to get a discount on the prices of articles in the shops specified in the list. The complainant purchased a gold chain from the jewellery voucher of Rs.20,000/-. It is the case of the complainant that when he enquired from the market, the gold chain was worth Rs.8000/- only. It is further the case of the complainant that when he enquired with Suman Motels about the holiday package, he learned that he had to pay an additional amount of Rs.1200/- as admission fee per package. It is the case of the complainant that

when he needed holiday package, Suman Motels refused to give him room under the pretext of non-availability of rooms. According to the complainant, the Customers Club Card was not useful to him because the prices of the goods were exorbitant in the shops given in the list. Thus, the complainant lodged his complaint against the company and its directors for having duped him of his monies amounting to Rs.53,500/-.

4. It is an admitted fact that the Company is a Multi Level Marketing Company. The said fact is also mentioned in the remand application. The Government of India, Ministry of Consumer Affairs, Food and Public Distribution, vide their D.O.Letter No.21/22/IT/2001 dated 31st March, 2003 has issued a Circular wherein it is stated that the provisions of the Price Chit and Money Circulation Scheme (Banning) Act, 1978, would not be applicable to direct/net work/multi level marketing. In the said Circular, it is stated as under:

. "We have examined these issues in detail, including consulting the Ministry of law, regarding the

> applicability of the said Act to these companies. It is our considered view that the provisions of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978 are not applicable to companies dealing with distribution of goods including multi level/net work marketing companies. Interpretation of various judgments by the Hon'ble Supreme court **(a) State of West Bengal Vs. Swapan Kumar Guha (1982) 1 SCC 561; (b) Srinivasa Enterprise Vs. UOI (1980) 4 SCC 507; and (c) Reserve Bank of India Vs. Peerless Co. (1987, 1 SCC 499,** implies that activities of direct/net work/multi level marketing do not fall within the provisions of the aforesaid Act."

. Mr.Saraogi has submitted that admittedly the present Company is a multi level marketing as such it would be covered by this Circular and hence, the complaint is not maintainable.

5. Mr.Saraogi has further pointed out that another company by name Remo Marketing Pvt.Ltd. had a similar modus operandi. However, instead of jewellery, club membership and holiday package, Remo Marketing Pvt.Ltd. dealt with websites, mobile telephone handsets and prepaid cards. The scheme therein was similar to that of the present company. Mr.Saraogi stated that Remo Marketing

Pvt.Ltd. had sought an opinion from the Former Chief Justice of India Justice Y.V.Chandrachud regarding the legality of money multiplier programme. The said opinion is dated 13th December, 2002. In the said opinion, it is clearly stated that the scheme does not violate the provisions of the Price Chit Act or any other law bearing on the matter. Mr.Saraogi has further pointed out that opinion was also sought from Mr.Justice A.N.Divecha, Retired Judge of the Gujarat High Court by Remo Marketing Pvt. Ltd. in respect of the same scheme which came under the multiple level marketing scheme. In the opinion of Justice Divecha, the scheme floated by Remo Marketing Company, could not be styled as Chit or Chit Fund and hence, it would not be amenable to the Chit Fund Act, 1982 or the provisions of Prize Chit Act. As stated earlier the company is a multi level marketing company, in view of the scheme of the Company and the circular issued by the government and the two opinions mentioned above, I am of the opinion that the petitioners would be covered by the opinions and the circular.

6. The petitioners are also facing prosecution under Section 420 of IPC. As far as Section 420 of IPC is concerned, it is seen that the presentation of the Company was not open to all persons. A person who wanted to attend the presentation had to pay entry fee and thereafter, attend the presentation. Thus, it is clear that only those persons who were aware of the Scheme and who were interested in joining, paid the entry fee and attended the presentation. The scheme was explained to all the persons who attended the presentation in detail so also the brochures of the company were available. The scheme of the company is that if Rs.53,000/- is paid the member would get vouchers for Rs.20,000/- towards jewellery from Danabhai Jewellers, the member would get holiday vouchers valid for three years. The said holiday vouchers were mainly of Suman Motels. The member would get club membership of the club Aquaria or countrywide club and the member would get a customer club card which would entitle the member to discounts at various establishments mentioned in the list. On the perusal of the complaint, it is seen that the complainant received jewellery

vouchers, holiday vouchers and the customer club card and club membership of club of Aquaria of Borivali. It is clearly stated in the complaint that complainant has received all these vouchers. In fact, from the jewellery voucher of Rs.20,000/- the complainant purchased a gold chain from Danabhai jewellers at Crossroad Departmental Stores Tardeo, Mumbai which is a reputed store. Thus, from the complaint itself is is seen that whatever was committed by the company towards the amount of Rs.53,000/- was fulfilled by the company. Thus, it cannot be said to be a case of cheating.

7. However, it appears to be the case of the complainant that the gold chain purchased by him from Danabhai Jewellers at Cross Road Departmental Stores was worth only Rs.8000/-. It is pertinent to note that it is not the case of the complainant that the chain was not made of gold or that it was not made of the carat mentioned in the jewellery bill or that the chain was not of the weight mentioned in the bill. From the brochures, it is seen that jewellery in question is designer jewellery, hence, it is bound to be more expensive

than the other jewellery available in the market. Moreover, Mr.Saraogi has pointed out that if the complainant was not happy with the jewellery, the complainant could avail of the 'buy back' clause or 'return policy' which is provided in the Agreement and under the Rules and Regulations. The said buy back scheme is clearly stated on the form signed by the member. It is an admitted fact that the complainant had also signed such a form. Thus, there appears to be much merit in the contentions of Mr. Sarogi that if the complainant was not happy with the jewellery he could have availed of the buy back scheme. It is not the case of the complainant that he approached the petitioner in respect of the buy back scheme and the petitioner refused to buy back the jewellery. The complainant has not availed of the said scheme and has hastily lodged the complaint.

8. As far as the holiday vouchers are concerned, the grievance of the complainant is that when he needed the holiday package, Suman Motels refused his requirement under the pretext of non-availability of rooms. It is also his

grievance in respect of the holiday vouchers that he had to pay additional amount of Rs.1200/- as an admission fee to Suman Motels. As far as this grievance is concerned, it is seen that holiday vouchers clearly state the terms and conditions. On the reverse of the voucher it is inter alia stated as under:

. "1. Room Reservation is subject to room availability.

2. ....
3. ....

. 4. The calender enclosed gives the most likely dates for getting your holiday entitlements.

. 5. ....

. 6. A minimum of Rs.1200/- have to be paid as processing fees.

. 7. All holiday accommodations are strictly subject to availability.

. 8. ...."

9. The petitioner-company has tied up with Suman Motels and various other clubs and resorts in respect of the holiday vouchers. The product Catalogue of the company clearly gives various details in respect of the holiday vouchers in the

form of questions-answers. In the said Catalogue, the following details are given:

Q. Do I have to pay any fees for booking holidays?

A: Yes, you have to pay administration/booking fees (depends on supplier).

. Thus, the Brochures and Catalogue clearly inform every member who enrolls that he has to pay the administration/booking charges for his holidays. Thus, the member who enrolls, is clearly made aware of the fact that while booking a holiday package, he has to pay administration/booking fees. The same booklet also provides further information as below:

Q: How late may I book?

A: You should book atleast 45 days before your departure date. However, by booking early, you improve your chances of obtaining the locations you most desire.

. For the Vacation Network scheme you may call the relevant supplier immediately and make your reservations.

Q: Are there any hidden costs when I arrive at the resort?

A: All charges are included with most resorts; however, you are responsible for all personal expenses such as telephone calls, meals, optional maid services and some resort amenities. In some instances, resorts may have security deposits, utility surcharges or taxes which must be paid by you directly to the resort. Please refer to our Resort List for full details of each resort.

10. Thus, whenever a member enrolls, he is clearly made aware that he has to book at least 45 days in advance. Obviously, during the major vacations like Summer, Christmas and Diwali, there is bound to be huge rush, hence, customer/member is advised to book much in advance. In such case, if a member calls the resort/hotel and demands a room in the next few days, obviously it would not be available.

11. The learned A.P.P. on instructions has admitted that there is an Agreement between the Petitioner-company and Suman Motels and other Clubs. Had there not been any Agreement between the Petitioner-Company and Sumon Motels, Clubs and Resorts, in such case, it can be said that the

Company intended to cheat the complainant. The refusal is not on part of the petitioner company but on behalf of Suman Motels. The complainant does not state that he called the Suman Motels well in advance yet his request was refused.

12. Looking to these facts, it is seen that whatever is promised by the company on their part i.e. jewellery vouchers, holiday vouchers, club membership and card, has been fulfilled by the company. It cannot be said that from the beginning the petitioners had the intention to cheat the complainant. Everything that was promised by the company has been given to the complainant. In fact, in the complaint itself, the complainant admits that he has received the jewellery vouchers, holiday vouchers and club membership and customer club card.

13. It is the grievance of the complainant that as far as the customer club card was concerned, it was not useful to him because the prices of the goods in the shops given in the list by the petitioner-company were exorbitant. As far as this

contention is concerned, it is seen that it is not the case of the complainant that in the said shops the prices for the general public was less and only when the customer club card was produced the shop stated higher price. The shops mentioned in the list are reputed shops. The prices of the articles in the said shops are fixed. Thus, infact when a member produced the customer club card he is entitled to a discount on the prices of the goods in the shop, whereby the goods would be available to the customer at a lesser price. In such case it cannot be said that the complainant was cheated by the petitioners as the prices were high in the said shops mentioned in the list.

14. From the charge sheet Mr.Saraogi pointed out the terms and conditions which are printed at the back of the application form which each prospective customer has to fill in at the time of getting the membership. He submitted that the said form and brochures show the policy and procedure which is to be followed and the things which each customers is supposed to get. It is his submission that the said application by itself gives the exact idea to

such prospective customer about the nature of the transaction which he has to transact after becoming a member of the company. Therefore, according to him, there is no fraud, deceit or cheating at all.

15. Mr. Sarogi further submitted that there is no element of cheating or misappropriation or presence of any ingredients of Sections 3,4 or 5 of the Prize Chit Act in the activities which are being transacted by the company, its Directors and employees. He demonstrated it by making a reference to the Brochure issued by the said company in which various articles have been mentioned which such a customer can get after becoming a member of the scheme. The said brochure clearly mention four articles which the person is entitled to get. Admittedly, the complainant got those things. The said amount of Rs.2,500/- has been received by the company, the petitioners and the employees of the said company towards processing fee which they are entitled to get because that sum is to be used for the purposes of maintenance of the office and payment of salaries to the employees and towards the profit which the

company is to earn by such commercial transactions. Therefore, Shri.Saraogi submitted that the scheme contemplates real transaction of sale of articles and it is not a transaction of wagering or a transaction which is without exchange of consideration and exchange of articles. Mr.Saraogi for the petitioners stated that in the present case the complainant has entered into the scheme with open eyes after going through the catalogue and documents. He is not an illiterate person but he is a well educated person. There is no element of cheating or misappropriation. It is his submission that the catalogues, brochures and the application form itself give an exact idea to a prospective customer about the nature of the transaction after becoming a member of the company. Therefore, he has submitted that there is no fraud, deceit or cheating at all. On perusal of the catalogues, brochures and application form which have been produced by the learned A.P.P., I find much substance in this contention.

16. The petitioners are also facing prosecution under Section 406 of IPC. It is the case of the

prosecution that complainant and other members have paid about Rs.53,000/- to the petitioner-company and the said money has been misappropriated by the petitioners. It is seen that petitioner-company had entered into Agreement with Danabhai Jewellers, Suman Motels, various clubs and establishments. The vouchers for the jewellery, holiday, club member ship and cards was handed over to the complainant. The company inturn has paid the various establishments, resorts, hotels and Danabhai Jewellers. In such case the amount of Rs.53,000/- except the processing fees, have been handed over by the company to all these persons. As stated earlier, the jewellery vouchers and holiday vouchers, club membership and customers card were given to the complainant. In such case, it cannot be said that the petitioners misused the money for their own benefit or misappropriated the amount or converted the money to their own use. It is nobody’s case that petitioners were required to hold money for and on behalf of the complainant. In such case, no case is made out under Section 406 of IPC. Looking to the facts and circumstances of this case, none of the ingredients of Section 405

of IPC are made out in the present case.

17. The petitioners are also facing the prosecution under Sections 4 and 5 of the Prize Chits Act.

18. Section 5 provides for penalty for other offences in connection with the Prize Chits Act or Money Circulation Scheme. Section 4 provides for the punishment for any one who contravenes the provisions of Section 3. Section 3 of the Prize Chits Act, reads as under:

> . **Banning of prize chits and money circulation schemes or enrolment as members or participation therein:---** No person shall promote or conduct any prize chit or money circulation scheme or enrol as a member to any such chit or scheme or participate in it otherwise or receive or remit any money in pursuance of such chit or scheme.

19. In relation to Section 3, it would be necessary to see the definition of ‘Prize Chits’ and ‘Money Circulation Scheme’ which are as under:

. 2(c): "money circulation scheme"

means any scheme, by whatever name called, for the making of quick or easy money, or for the receipt of any money or valuable thing as the consideration for a promise to pay money, on any event or contingency relative or applicable to the enrolment of members into the scheme, whether or not such money or thing is derived from the entrance money of the members of such scheme or periodical subscriptions;"

. 2(e): "'Prize chit' includes any transaction or arrangement by whatever name called under which a person collects whether as a promoter, foreman, agent or in any other capacity, monies in one lump sum or in instalments by way of contributions or subscriptions or by sale of units, certificates or other instruments or in any other manner or as membership fees or admission fees or service charges to or in respect of any savings, mutual benefit, thrift or any other scheme or arrangement by whatever name called and utilises the monies so collected or any part thereof or the income accruing from investment or other use of such monies for all or any of the following purposes, namely:-

. (i) giving or awarding periodically or otherwise to a specified number of subscribers as determined by lot draw or in any other manner, prizes or gifts in cash or in kind, whether or not the recipient of the prize of gift is under a liability to make any further payment in respect of such scheme or arrangement.

. (ii) refunding to the subscribers or such of them as have not won any price or gift, the whole or part of the

> subscriptions, contributions or other monies collected, with or without any bonus, premium, interest or other advantage by whatever name called on the termination of the scheme or arrangement, or on or after the expiry of the period stipulated therein, but does not include a conventional chit."

20. Mr. Sarogi, has submitted that there is no element of circulation of money for making quick or easy money and making easy gains as contemplated by provisions of Section 2 (c) of the Prize Chit Act. He submitted that the provisions of section 2(e) are also not attracted because there is no transaction which would attract the word "Prize Act".

21. Shri. Saraogi submitted that in the present case when a member enrolls he is sure to get jewellery, holiday vouchers, club membership and customer card. In the present case, there is no speculation as such and there is no uncertainty of the happening of any event. There is nothing which is determined by lot or draw nor is there any element of chance. Shri. Saraogi submitted that no false promises have been given by the present

company, its directors and employees to any of the member including the complainant. All the four things promised i.e. jewellery voucher, holiday voucher, club membership and card have been given to the complainant and in fact it is an admitted fact that all members who have enrolled have received these four articles.

22. The learned A.P.P. submitted that the fact that the customer is required to bring future customers and by procuring such customers he is to get commission which itself shows that he is earning easy money or quick money, hence, the case would be covered by the Prize Chits Act. In the present case, it is seen that the scheme is not for "quick" or "easy" money. The scheme shows that jewellery, holidays vouchers, club membership and customers card are available to a prospective customer on payment of certain amount. In the present case it is seen that on amount being paid all the four articles are given to the members.

23. The scheme of the petitioner cannot be said to be a scheme to gain "quick" or "easy" money. It

appears that the complainant is aggrieved that he could not get any persons to enroll as members. It is to be noted that complainant as well as all the members who have participated in the scheme are all educated people. No member is illterate and the members are residing in the city like Mumbai. They are well aware of business dealings. Now-a-days it is a very difficult job to catch, drag or fetch such customers or members. Experience tells that it is now-a-days difficult for even the insurance agents to do such exercise. Everybody is cautious and watchful before entering into such schemes. It is seen that the complainant has failed in his efforts to get new members. Because the complainant failed to get new members, he cannot hold the company responsible. It is not the case of the complainant that he brought various customers / new members to enroll and the company failed to pay him commission. The getting of commission on new members enrolling, would depend upon the efforts of the member himself. If the member failed to get any new member and thus, did not get any commission, it cannot be said to be the fault on the part of the company.

24. The former Chief Justice of India Justice Y.V. Chandrachud has opined in relation to multi level marketing scheme that any member who sponsors other member in order to qualify for receiving commission, does not make any promise. Above all, it is seen that the Company itself did not give any promise of any kind whatsoever that the member who enrolls will get certain amount of commission. It is also to be noted that no member is under an obligation to keep the scheme running progressively. The member joins the scheme of his own volition. The company only provides services to the members for which it charges a sum as a membership fee and registration fee which is by way of service charges including the postage and processing of forms. The amount which a member would receive, is wholly dependent on his own efforts and the performance of his downline persons i.e. new members brought by him. It is significant to note that there is no burden or obligation whatsoever on any member to continue the scheme. This is a a matter of their own volition. All these observations have been made inthe

opinion.

25. The main ingredient of Prize Chit as defined under Prize Chit Act, is use of the collected monies in the manner specified therein for the purposes mentioned therein. In the scheme floated by the petitioners, the monies collected from members are used for providing jewellery, holiday vouchers, club membership and customer club card. The monies collected from the members were not used for any of the purposes mentioned in Section 2(e) of the Prize Chit Act. Section 2(e) of the Prize Chit provides that the money collected is utilised for giving to the subscribers as determined by lot or draw or any other manner, prizes or gifts in cash or kind. Sub-section (ii) speaks of refund. In the present case, there is no question of any refund. Hence, we have to see whether the case of the petitioners falls within sub-section (i). In the present case, there are no lots or draws or any element of chance. Until and unless the money is used for the purpose mentioned in sub-section (i) and (ii) to Section 2(e), it cannot be said to be a Prize Chit. The monies in the present case have

not been used for making periodic payments to a 'specified' number of subscribers as determined by lot or draw. In the present case there are no specified number of subscribers to whom periodic payments were to be made. Moreover, there was no question of the subscribers being determined by lot or draw or by any means which had any element of chance. Thus, the provisions of sub Section (i) of Section 2(e) is not attracted. I have already observed earlier that sub Section (ii) of Section 2(e) is not attracted in the present case. Thus,it is clear that scheme of the petitioner would not be covered by the definition of Prize Chit. If the scheme is not covered by this definition, the scheme would not attract any of the provisions of the Prize Chit Act. Thus, it cannot be said that activities of the petitioners would be covered by the Prize Chit Act.

26. The case would also not be covered under the provisions of Prize Chits and Money Circulation (Banning) Act, 1978 as there is no element of circulation of money for quick or easy money or easy gains to the parties by the said transactions.

There is no wagering or a transaction which is without exchange of consideration. The method adopted by the company is only a method adopted for sales promotion as a business strategy for larger sales. Therefore, in my opinion, the transaction between the petitioners and complainant would not be covered by the Prize Chits and Money Circulation (Banning) Act, 1978.

27. In the present case, it is pertinent to note that the complainant in his complaint has not alleged directly or indirectly that the firm was promoting or conducting a scheme for the making of quick or easy money, **dependent on any event or contingency relative or applicable to the enrolment of members into the scheme;** nor does it contain any allegation whatsoever that persons who advanced or deposited their monies with the firm were participants of a scheme for the making of quick or easy money, **dependent upon any such event or contingency.** Since the complaint **(FIR)** and the other material do not disclose the essential requirements of Section 2(c) and 2(e) of the Prize Chit Act, it cannot be said that any offence under

the Prize Chit Act has been committed.

28. It seems to me impossible to hold on the basis of the material collected by the investigating agency that any offence can be said to be made out prima facie under Section 4 and 5 of the Act. In the first place, the FIR does not allege, directly or indirectly that the firm was promoting or conducting a scheme for the making of quick or easy money, dependent on any event or contingency relative or applicable to the enrolment of members into the scheme. Secondly, the FIR does not contain any allegation whatsoever that persons who advanced or deposited their monies with the firm were participants of a scheme for the making of quick or easy money dependent upon any such event or contingency.

29. It may be stated that complainant has stated in the FIR that the complainant promised him quick and easy money. It is pertinent to note that the said money which would be given to the complainant, would be dependent on his efforts to get other persons to become members. Obviously, the

complainant failed to get new members, hence, the company did not give him any commission. For this the complainant cannot hold the company responsible and make it a scape goat. In relation to quick easy money it would be advantageous to refer to a decision of the Supreme Court in the case of **State of West Bengal and Others Vs. Swapan Kumar Guha and others [(1982) 1 SCC 561)**. In the said case the provisions of the Prize Chits Act came to be considered. In the said case, the FIR came to be quashed by the High Court. The said order was upheld. The Supreme Court observed thus:

. "For the matter of that, I cannot believe any law to ban every kind of activity for making quick or easy money, without more, on pain of penal consequences. It is far too vague and arbitrary to prescribe that "whosoever makes quick or easy money shall be liable to be punished with fine or imprisonment". For then, in the absence of any demarcation of legitimate money-making activities from those which fall within the ban, the question whether the penal provision is attracted in a given case will depend upon the will and temper, sweet or sour, of the magistracy. Besides speaking of law and morals, it does not seem morally just or proper to say that no person shall make quick or easy money, especially quick. A

> person who makes quick money may do so legitimately by the use of his wits and wisdom and no moral turpitude may attach to it. "

30. In the present case, the investigation is over and the charge-sheet has been filed. Though the complaint was filed in the year 2003, the charge sheet has been filed just a month ago. On perusal of all the material which has been placed before the Court, I find that, it cannot be said that the company is conducting a money circulation scheme. Nor can it be said that any offence of cheating or misappropriation is made out.

31. In the result, Case No. 1471/PW/2005 pending before the learned M.M., 19th Court, Esplanade, Mumbai and the proceeding relating thereto are quashed.

31. Writ petition is disposed of.

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